IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

SYLVIA LEEDS	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil Action No. 6:09cv00061**
	)	
JOHN DOE ONE, *ET. AL.*	)	
	)	
Defendants	)	

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW the plaintiff, Sylvia Leeds, by counsel, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure ("FRCP") and Title II, Rule 11(c)(2) of the Local Rules of the United States District Court for the Western District of Virginia ("W.D.Va.Gen.R."), and submits this Brief in support of her Motion for Summary Judgment.

Statement of the Case

On October 14, 2009, the plaintiff, Sylvia Leeds (hereinafter "Leeds") instituted this action against John Doe One[1], John Doe Two, Pendum, LLC ("Pendum")and The Kroger Co. ("Kroger") in the Circuit Court for the City of Lynchburg, Virginia. On November 13, 2009, both Pendum and Kroger removed the case to this Court. (*See, generally,* Notice of Removal [DE 1]). In her Complaint, Leeds alleged that on August 5, 2009, she suffered injuries when a boxed patio umbrella (hereinafter "the umbrella") fell on her while she was in Kroger Store No. 408 in Lynchburg, Virginia (Comp. ¶8). Leeds further alleged that the umbrella fell on her because (i) an unidentified Kroger employee (John Doe One) negligently leaned the umbrella against an unsecured magazine rack and (ii) because an unidentified Pendum employee, while servicing an adjacent ATM machine, caused the door of the machine to strike the magazine rack, thereby causing the umbrella to fall and hit Leeds (*Id.*¶¶ 7-8).

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[1] John Doe One was dismissed by Order entered March 3, 2010 (DE 23).

Pursuant to the Court's Pre-trial Order [DE 15] and the Pre-trial Plan of the parties [DE 18], the parties engaged in extensive discovery related to the Leeds claim. On April 20, 2010, Leeds deposed Pendum's employee, Calvin Whitt ("Whitt") and two Kroger employees, James Morris ("Morris") and Carly Burrage ("Burrage"). After these depositions, Leeds determined that she could not produce sufficient evidence to pursue her claim against Pendum; and Leeds and Pendum filed a Joint Motion for Voluntary Dismissal [DE 31]. Briefs were filed; and a hearing on the Motion held on May 19, 2010, at the conclusion of which, the Joint Motion was granted and Pendum was dismissed as a party defendant [DE 44].[2]

The facts adduced by Leeds during discovery, however, portray a somewhat different scenario leading up to the events of August 5, 2009, than that set forth in her Complaint. While Whitt

[2] Common sense dictates the conclusion that John Doe Two should also be dismissed as a party defendant, although no motion to that effect has been filed.

testified that the umbrella was leaning against the magazine rack as alleged in the Complaint (Whitt Dep., page 22, line 25-page 23, line 5), Morris, who was Kroger's store manager at the time, testified that the umbrella was placed in an upright leaning position on its end against the customer service desk by Ashley Saunders, another Kroger employee (Morris Dep., page 22, lines 6-16), that it was leaning in this position against the customer service desk for a period of approximately three hours (Morris Dep., page 24, line 21–page 25, line 3) and that the box containing the umbrella was square, measuring 7.28'' x 7.28" x 59.45" (Morris Dep. Page 29, lines 18-19).

Burrage, who was the Kroger employee assisting Leeds at the customer service desk, testified that she observed the umbrella at the customer service desk (Burrage Dep., page 10, lines 9-10) and noted that the top of the box containing the umbrella extended approximately 7 inches above the top of the raised portion of the customer service desk counter (Burrage Dep., page 10, lines 19-24).

While none of the parties deposed actually witnessed the umbrella falling or were able to testify as to what might have caused it to fall, Leeds testified that the box containing the umbrella struck her on the left side of her head and on her left shoulder, elbow and hip as it descended to the floor of the store (Leeds Dep., pages 13, line 18-page 14, line 6; page 26, lines 15-16; page 35, lines 7-9; page 37, line 10).

Argument and Authorites

I. **The Standard for Summary Judgment**

A party is entitled to summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to Judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)[Emphasis supplied]. In "considering a motion for summary judgment, the district court must 'draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.'" *Thompson Everett, Inc. v. National Cable Advertising L.P.,* 57 F.3d 1317, 1323 (4th Cir. 1995) (citing *Tuck v. Henkel Corp.,* 973 F.2d 371, 374 (4th Cir. 1992), *cert. denied*, 507 U.S. 918, 113 S.Ct. 1276, 122 L.Ed.2d 671 (1993)). However, "those inferences must, in every case, fall within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture." *Thompson Everett*, 57 F.3d at 1323. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial and summary judgment is appropriate." *Roto-Die Company,* *Inc. v. Lesser*, 899 F.Supp. 1515, 1518 (W.D.Va. 1995) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Co.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 189 L.Ed.2d 538 (1986)).

II. **Kroger Caused an Unsafe Condition to Exist That Led to the Injuries Suffered by the Plainitff**.

In Virginia, "[t]o recover against the owner of premises, an injured invitee must first establish the existence of an unsafe condition on the premises." *Kendrick v. Vaz, Inc.*, 244 Va. 380, 385, 421 S.E.2d 447, 450 (1992) (citing *Roll 'R' Way Rinks v. Smith*, 218 Va. 321, 327, 237 S.E.2d 157, 161 (1977)). Here, there is no dispute that Leeds was an invitee to the Kroger store or that she was injured while in the store.[3]

In this case, the unsafe condition was the placement of umbrella against the customer service counter by a Kroger employee. According to the testimony of Kroger's own store manager, the umbrella was set on its end at a steep angle against the counter and was not otherwise secured. That this is so was confirmed by Burrage, who stood behind the customer service desk while assisting Leeds and other customers and observed the box containing the umbrella resting against the customer service counter.

In this position, the potential existed for the umbrella to fall for any number of reasons – it could have been jostled by someone; it could have toppled as a result of vibrations from shopping carts or store dollies containing inventory passing by or it could have been dislodged by the customer service desk entry door or cash register drawer closing. The mere fact that one, based on common human experience, can foresee a number of different ways in which a boxed patio umbrella that may be top-heavy and is placed otherwise unsecured against something not specifically designed to support it demonstrates that Kroger created an unsafe condition by placing the box there and not taking steps to move or secure it.

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[3] While there is some dispute as to the severity of Leeds' injuries, there is no apparent dispute that she was struck and injured.

The risk of injury was foreseeable to an ordinarily prudent person, and Kroger had a duty to exercise reasonable care to not cause this unsafe condition and, having caused it, to remedy it before someone was injured. *See Winn-Dixie Stores, Inc. v. Parker*, 240 Va. 180, 183, 396 S.E.2d 649, 650 (1990) ("If an ordinarily prudent person, given the facts and circumstances [the defendants] knew or should have known, could have foreseen the risk of danger resulting from such circumstances, [the defendants have] a duty to exercise reasonable care to avoid the genesis of danger.")

It does not matter which one of aforementioned possibilities, or whether some other event, ultimately caused the umbrella to fall on Leeds; because it is *not* a requirement of Virginia law that Leeds show *why* the umbrella fell on her. As the Fourth Circuit stated in *Hodge v. Wal-Mart Stores*, 360 F.3d 446 (4th Cir. 2004):

> A plaintiff who can show both that an unsafe condition existed on store premises and how that condition injured

> her is not precluded, under Virginia law, from reaching a jury on the issue of negligence simply because she lacks evidence as to *why* the unsafe condition resulted in her injury. Rather, the plaintiff's claim may survive summary judgment if the evidence would allow a reasonable jury to conclude that the premises' owner had actual or constructive notice of the unsafe condition that caused her injury — *i.e.*, that the condition posed a foreseeable risk of danger to invitees and the owner had actual or imputable knowledge of the condition and its danger — and the jury could conclude that the owner was negligent in addressing the unsafe condition.

Hodge, 360 F.3d at 452 (2004).

In articulating this statement of Virginia law, the Fourth Circuit relied upon *O'Brien v. Everfast, Inc.*, 254 Va. 326, 491 S.E.2d 712 (1997). In *O'Brien*, the plaintiff was shopping at a Calico Corners fabric store, when a heavy bolt of fabric leaning against a cutting table fell and hit her. O'Brien sued for negligence and won a jury verdict, which was set aside by the Circuit Court for the City of Richmond. O'Brien appealed to the Virginia Supreme Court, which reversed the trial court. In doing so, it held that "[t]he absence of evidence as to what caused the bolt of fabric to fall would not preclude the jury from finding that O'Brien's injury resulted from Everfast's negligence." *O'Brien*, 254 Va. at 331, 491 S.E.2d at 714.

O'Brien, in turn, relied on *Holcombe v. NationsBanc Financial Services*, 248 Va. 445, 450 S.E.2d 158 (1994), a case that is compellingly similar to the present matter. The facts adduced in *Holcombe* established that "[i]n a bathroom provided for the use of employees and customers, the defendant had stored two heavy partitions that previously had been bolted to a wall in another part of the office." *Holcombe*, 248 Va. at 445, 450 S.E.2d at 159. The partitions were leaned up against the wall of the bathroom; and after having been in place for several months, they fell on Holcombe, trapping her between them and the commode. The branch manager testified that no measures had been taken to prevent the partitions from falling and that they had been stored in the bathroom for several months prior to the incident. Holcombe could not prove why the partitions fell; and on this basis, the Circuit Court for the City of Virginia Beach granted NationsBanc's motion to strike the plaintiff's evidence.

The Virginia Supreme court reversed, holding:

> Specifically, we think a jury reasonably could infer from the evidence that it was foreseeable injury would result from storage of the partitions in the place and in the manner disclosed by the record. The fact, stressed by the defendant, that the partitions had remained in the bathroom for several months without incident does not detract from the foreseeability of injury occurring, albeit the injury occurred later rather than sooner.

Holcombe, 248 Va. at 448, 450 S.E.2d at 160.

Holcombe is on all fours with the instant case. In *Holcombe* the defendant, NationsBanc, created an unsafe condition by stacking heavy objects against a wall not designed to support them and without first securing them. Although the plaintiff, Holcombe, was unable to show why the partitions fell, the Virginia Supreme Court held that she need not do so to demonstrate that injury from their method of storage was foreseeable.

Moreover, *Holcombe* also establishes that just because an unsafe condition exists for a long period of time – in that case, several months – before injury occurs does not mean that the condition was not unsafe at the outset.

As in *Holcombe*, in the instant case, Kroger created the unsafe condition by placing the umbrella sitting in a long square box on its end, unsecured, against the customer service counter that is not designed to support such an object or render it incapable of falling. This unsafe condition led directly to Leeds' injuries when the umbrella toppled, striking her. The fact that the umbrella had rested in that position for a period of approximately three hours before toppling does not demonstrate that the condition was not unsafe at the outset.

Given the many ways in which such a boxed patio umbrella resting on its end against a ledge could fall, it is clear that an ordinary person should have foreseen the risk of injury and that therefore Kroger had a duty to exercise reasonable care to not cause the unsafe condition and, having caused it, to remedy it before someone was injured.

In addition to the foregoing, the fact that there is a divergence in the testimony about the exact location of the umbrella prior to its striking Leeds does not absolve Kroger of liability. Morris testified that the umbrella was placed against the customer service counter by a Kroger employee, and Burrage testified that she saw it there. While Whitt, on the other hand, testified that the umbrella was leaning against a magazine rack in front of the customer service counter and immediately to the left of the area where customers normally stood, it is not clear that giving credence to Whitt's testimony is viewing the evidence in the light most favorable to the defendant.

In the first place, to believe Whitt's version of the incident requires disbelieving both of the defendant's own employees. Secondly, the testimony of Whitt as to the placement of the umbrella against the magazine rack[4], to put it kindly, contradicts the laws of physics. As pointed in footnote 4, he testified at his deposition that the umbrella was leaning against the magazine rack at an angle greater than 90° away from Leeds. It is uncontroverted that the umbrella struck Leeds, as demonstrated by her own testimony, as well as Whitt's. For the umbrella in the position described by Whitt to strike Leeds in the head, it would have to have somehow moved from its leaning angle of rest away from Leeds and pass through a vertical (or 90°) position before striking Leeds. In sum, Whitt's testimony on this point is not only incredible but is conclusively contradicted by all of the other evidence in the case.

Even assuming, however, for the sake of argument herein, that Whitt's testimony is true, it still does not absolve Kroger of

[4] Whitt testified that the umbrella was leaning against the magazine rack with the top of the box leaning away from the location where Leeds was standing (White Dep., page 31, lines 19-22).

liability. Kroger placed the umbrella, unsecured, in a place not designed to support it and where common human experience would suggest it could easily be jostled or dislodged. This unsafe condition was created by a Kroger employee and observed by a Kroger employee, and the fact – if it is indeed true – that the umbrella somehow came to rest against the magazine rack before striking Leeds does not alter the underlying fact that Kroger, by placing the umbrella on end in a location not designed to support it and without securing it, directly caused the unsafe condition that led to Leeds' injuries. In short, this difference in the testimony about the location of the umbrella prior to it striking Leeds is not material to the issue of Kroger's liability, *cf. Anderson, supra*.

Moreover, Leeds would argue that no rational trier of fact could credit Whitt's testimony about the position of the umbrella in light of the uncontradicted fact that it fell on her, *cf. Roto-Die, supra*.

III. Kroger Had Actual Knowledge of the Unsafe Condition

Once it is established that an unsafe condition exists, "[i]n order to hold the owner of property liable for injuries sustained by an invitee due to the unsafe condition of the premises, it must be shown that the owner had knowledge of the alleged unsafe condition, or that it had existed for such a length of time as to make it the owner's duty in the exercise of ordinary care to have discovered it." *Cannon v. Clarke,* 209 Va. 708, 712, 167 S.E.2d 352, 355 (1969) (citations omitted).

In this case, it is clear that Kroger had actual knowledge of the unsafe condition. Ashley Saunders, A Kroger employee, placed the umbrella on its end leaning against the customer service counter; and Burrage observed it there during the course of the over three hours it was in that position. Thus, Kroger had actual knowledge of the unsafe condition because it created it.

IV. Leeds is Entitled to Summary Judgment

According to *Holcombe*, "'[u]nless the evidence is without conflict, or unless fair-minded [persons] cannot differ on the inferences to be drawn from it,' the question of whether the owner of the premises has exercised the required care toward his invitee is a matter for the jury." *Holcombe*, 248 Va. at 448, 450 S.E. 2d at 160 (quoting *Crocker v. WTAR Radio Corp.*, 194 Va. 572, 574, 74 S.E.2d 51, 53 (1953), in turn quoting *Knight v. Moore,* 179 Va. 139, 146, 18 S.E.2d 266, 270 (1942)).

Here, the evidence is without conflict and fair-minded persons cannot differ on the inferences to be drawn from it, *cf. Thompson Everett, supra*. A Kroger employee, acting within the scope of her employment, leaned the umbrella on its end against the customer service counter – a place not designed to support it and not a location in the store where patio umbrellas were customarily kept – and did nothing to secure it. A second Kroger employee observed it in those conditions. Thus, Kroger is clearly responsible for the unsafe condition created by the unsecured umbrella, first in placing the umbrella there; and, second, in failing to move it after observation.

Moreover, leaning the umbrella against the customer service counter as herein described *ad nauseam* is a clear violation of a well-recognized standard of care. Both *O'Brien* and *Holcombe* stand for the proposition that the owner of the premises has an obligation not to leave heavy objects that can topple and hit a person unsecured leaning at a steep angle against surfaces/objects not designed to support them. Both of these cases gave plenty of notice to Kroger that it should not have placed the umbrella leaning against the customer service counter unsecured, and no fair-minded person can help but draw the inference that Kroger created the unsafe condition and in doing so, failed to exercise the required care towards Leeds as embodied in those cases, *cf. Roto-Die, supra*.

Conclusion

For the reasons herein stated, the plaintiff respectfully asserts that this Court should enter summary judgment in her favor on the issue of liability.

Respectfully submitted,

SYLVIA LEEDS

By Counsel

/s/ Burton L. Albert
Burton L. Albert, Esq.
VSB No. 3304
3800 Electric Road, Suite 306
Roanoke, Virginia 24018
Telephone: (540) 776-8600
Facsimile: (540) 776-2800
Email: burt@balbertlaw.com
Counsel for Sylvia Leeds

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2010, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

C. Kailani Memmer, Esq.
GUYNN, MEMMER & DILLON P.C.
415 South College Avenue
Salem, Virginia 24153
Counsel for the defendant, The Kroger Co.

/s/ Burton L. Albert
Burton L. Albert, Esq.